No. 86-1626

In the Supreme Court of the United States

OCTOBER TERM, 1986

JANIE L. HASKINS, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court's determination that the Department of the Army had discriminated against petitioner on account of her sex did not include a finding that the Army would have promoted petitioner in the absence of discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 808 F.2d 192. The opinions of the district court (Pet. App. 18a-50a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1979, petitioner, a civilian employee with the United States Army at Fort Campbell, Kentucky, and three other women applied for a GS-11 position as Supervisory Budget Analyst (Pet. App. 2a). The Army selection panel ranked petitioner as "Highly Qualified" for the position, and ranked two of the other female applicants as "Best Qualified." The panel did not forward

petitioner's application for further consideration because only applicants ranked as Best Qualified were to be considered in the final selection process (*ibid.*).

The Army subsequently publicized more broadly the position to expand the applicant pool (Pet. App. 2a). Following that additional publicity, the selection panel reviewed all submitted applications, which included the original four female applicants and two new applicants, both of whom were male. The panel, as before, ranked the same two women Best Qualified, and it also ranked the two men Best Qualified (*ibid.*). Petitioner was again ranked only Highly Qualified, and her name was not forwarded for further consideration (*ibid.*). The Army selected one of the male applicants for the position (*ibid.*).

2. In February 1980, petitioner filed an administrative complaint with the Fort Campbell Equal Employment Opportunity Commission, in which she alleged that she had been denied the promotion on account of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 3a). The United States Army Civilian Appellate Review Agency (USACARA) investigated the complaint and, based on its recommendation, the Army proposed a finding of no discrimination (*id.* at 3a).

At petitioner's request, an EEOC complaint examiner conducted a hearing on petitioner's complaint. The examiner applied the burden shifting approach articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and found that the Army had discriminated against petitioner on the basis of her sex by preselecting a man for the job (Pet. App. 3a). Relying on *Day* v. *Mathews*, 530 F.2d 1083 (D.C. Cir. 1976), the examiner concluded (Pet. App. 4a), however, that petitioner was not entitled to a hiring order or back pay because the Army had shown by clear

and convincing evidence that she would not have been selected to fill the GS-11 position even absent the impermissible discrimination.

Both the USACARA's recommendation and the complaint examiner's findings were forwarded to the Office of the Assistant Secretary of the Army, which agreed with the examiner's findings but concluded that petitioner was entitled to an award of priority promotion and attorney's fees (Pet. App. 4a, 54a-84a). The Army further ordered the responsible officials at Fort Campbell to "insure that the matters which led to and resulted in [petitioner's] complaint do not recur by strict compliance with established regulatory policy and procedures of [the Office of Personnel Management] and the Department [of] Merit Promotion and Equal Employment Opportunity" (*id.* at 79a). On petitioner's appeal to EEOC's Office of Review and Appeal, the EEOC affirmed on the ground that petitioner would not have been selected even absent discrimination (*id.* at 4a).

3. Petitioner filed an employment discrimination complaint against the Army in the United States District Court for the Middle District of Tennessee in which she alleged that she had been the victim of unlawful sex discrimination, in violation of Section 703(a)(1) of Title VII, 42 U.S.C. 2000e-2(a)(1) (see 42 U.S.C. 2000e-16(d)), and in which she sought, inter alia, retroactive promotion, back pay, and attorney's fees and costs pursuant to Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g) (Pet. App. 5a). The Army filed a motion for summary judgment in which it acknowledged that it had discriminated against petitioner on account of sex, but contended that summary judgment should nonetheless be granted in its favor because, as the EEOC had found, petitioner would not have been hired in the absence of discrimination (*ibid.*). Petitioner moved for partial summary judgment on the

issue of Title VII liability and opposed the Army's motion for summary judgment. The district court granted petitioner's motion and denied the Army's motion (*id.* at 5a, 52a-53a). After holding a trial on the issue of relief, however, the court concluded that the Army had "clearly and convincingly proved that, absent discrimination by it, [petitioner] nevertheless would not have been selected to fill the [GS-11 position]" (*id.* at 50a). The court accordingly denied petitioner's requested relief.[1]

4. The court of appeals affirmed (Pet. App. 1a-17a). The court agreed (*id.* at 13a-14a) with the district court that petitioner was not entitled to relief because "the Army had established by clear and convincing evidence that [petitioner] would not have been promoted even in the absence of discrimination." The court of appeals rejected petitioner's contention that the court's intervening decision in *Blalock* v. *Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985)—which held that the causation inquiry should be made in determining liability, and not relief—required a different result. According to the court of appeals (Pet. App. 12a-13a), because the EEOC, Army, and district court had clearly assumed, prior to *Blalock*, that the causation inquiry was relevant to relief, and not to the threshold liability issue, *Blalock* should not be read as retroactively extending the EEOC's earlier determination of liability—admitted by the Army and adopted by the district court—to include a determination (and Army admission) that petitioner *would* have been promoted absent sex discrimination. The court of appeals stressed (Pet. App. 13a) the "unique posture" of this case, and that "[a] district court's findings, as with a party's admissions, must be analyzed in the setting they were made."

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[1] On December 9, 1985, the district court denied petitioner's motion to alter or amend its judgment and for an award of attorney's fees (Pet. App. 18a-25a).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court, and does not present a conflict with any decision of any other court of appeals that warrants this Court's review.

1. The court of appeals correctly upheld the district court's denial of petitioner's request for retroactive promotion and back pay under Title VII. Because Congress intended economic relief under Title VII to be measured by the extent of the actual economic injury, a court must deny retroactive promotion and back pay where such relief would exceed the actual injury. See *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-429 & n.4 (1975). For this reason, a Title VII plaintiff is not entitled to such retroactive relief unless the alleged discriminatory act caused his asserted injury. Where the employee would not have been promoted even in the absence of discrimination, the necessary causal link is missing. Cf. *Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 285 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977).

The district court in this case found that the Army had established by clear and convincing evidence that, regardless of any sex discrimination, petitioner would not have been promoted (Pet. App. 4a, 27a, 50a). Petitioner does not seriously claim that this factual finding is clearly erroneous,[2] but argues that the finding should nonetheless be ignored because it is contradicted by the district court's

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[2] Petitioner's suggestion (Pet. 28, 31) that the Army's preselection of a man for the GS-11 position "tainted" the entire process must be rejected. The district court found that "improper procedures were not employed in selecting the [four Best Qualified] applicants" (Pet. App. 50a), and the court of appeals expressly affirmed that factual finding (*id.* at 13a-14a).

determination that the Army is liable under Title VII. The court of appeals properly rejected petitioner's argument because no such contradiction exists.

Contrary to petitioner's assumption, the district court's determination of liability did not include a finding that the Army would have promoted petitioner in the absence of discrimination. As the court of appeals found (Pet. App. 13a), "there is absolutely no doubt that the * * * causation standard was not applied" by the district court in determining liability. Petitioner's challenge to the decision of the court of appeals therefore rests on an erroneous premise, and the court's denial of petitioner's requested relief was correct.

2. For similar reasons, petitioner's claim that the decision of the court of appeals conflicts with decisions of this Court and with decisions of other courts of appeals lacks merit.

a. Petitioner contends (Pet. 20-32) that this case presents a conflict in the circuits concerning whether the causation inquiry should be made during the liability stage, the relief stage, or during both stages, of an individual employment discrimination claim. Compare *Blalock* v. *Metals Trades, Inc.*, 775 F.2d at 709-712 (liability) and *Dillon* v. *Coles*, 746 F.2d 999, 1004-1005 (3d Cir. 1984) (same) with *Day* v. *Mathews*, 530 F.2d 1083 (D.C. Cir. 1976) (relief) and *Bibbs* v. *Block*, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (same). Any conflict in the circuits on that issue is not presented by this case, however, for two independent reasons.

First, the timing of the causation inquiry did not affect the proper disposition of petitioner's request for relief. Petitioner is not entitled to retroactive promotion and back pay as long as a causation inquiry is appropriate at either the liability or the relief stage. All the circuits agree

that it is appropriate at some stage and therefore petitioner would not be entitled to relief under the view of any circuit.

Second, the Sixth Circuit agrees with petitioner that the causation inquiry should occur only during the liability phase. See *Blalock* v. *Metals Trades, Inc., supra.* The Sixth Circuit ruled against petitioner in this case only because it rejected petitioner's contention that the EEOC's and district court's pre-*Blalock* determinations of Title VII liability embodied a finding that the wrongful action had caused injury to petitioner. The court of appeals instead deferred (Pet. App. 12a) to the unambiguous intent of the EEOC, Army, and district court to treat the causation issue separately. The court stressed (*id.* at 13a), however, that its ruling was based on the "unique posture" of the case—that the EEOC, Army, and district court had made their respective liability determinations prior to the court of appeals' decision in *Blalock*.

Hence, rather than present a conflict in the circuits on the proper timing of the causation issue, the case presents at most only the transitional issue whether the rule subsequently announced by the court of appeals in *Blalock* should retroactively dictate the scope of the prior determinations of liability. In our view, the court of appeals correctly rejected petitioner's view, which "would [have] require[d] * * * [the court of appeals] to ignore the established facts and to eliminate the question of causation from the Title VII analysis [in this case]" (Pet. App. 16a).[3] The court of appeals' decision, moreover, certainly

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[3] Petitioner is in any event hardly in a position to complain that the EEOC and district court failed to consider causation during the liability stage. Had the EEOC done so, presumably it would have concluded that the Army was not liable at all. The Army accordingly would not have awarded petitioner the relief it did in this case, which included priority promotion consideration, attorney's fees and costs for the administrative proceeding, and an injunction (see Pet. App. 79a-80a).

does not conflict with any decision of any other court of appeals. No other court of appeals has adopted petitioner's theory and, like the court of appeals (*ibid.*), "we [cannot] imagine that any other court would do so."[4]

b. Petitioner also asserts (Pet. 37-40) that the court of appeals' decision conflicts with the Fourth Circuit's decision in *Pecker* v. *Heckler*, 801 F.2d 709 (1986). According to petitioner (Pet. 38-39), the Fourth Circuit in *Pecker* "held that a federal employee who has been found to be an actual victim of discrimination at the administrative level is entitled to sue in federal court for effective relief without a further causal analysis." Petitioner's depiction of the holding in *Pecker*, however, fails to account for a critical factual distinction between that case and the instant case. In *Pecker*, a Title VII plaintiff sought enforcement and additional relief pursuant to an EEOC decision holding that the employee *would* have been promoted in the absence of discriminatory conduct (see 801 F.2d at 711 n.4). Because the district court was required to adopt the administrative findings that were favorable to the plaintiff, including the EEOC's causation analysis, the plaintiff in *Pecker* entered the district court having already established an entitlement to retroactive promotion and back pay. In the instant case, in contrast, the EEOC ruled that petitioner would *not* have been promoted even in the

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[4] Petitioner also contends (Pet. 30-31 & nn. 30-32) that review is appropriate because the courts of appeals currently disagree as to whether an employer must demonstrate the absence of causation by clear and convincing evidence or by a preponderance of the evidence. To the extent that such a conflict may exist, however, this case does not provide an appropriate vehicle for its review. Petitioner had the benefit of the clear and convincing evidence standard (see Pet. App. 13a-14a, 42a, 78a), which is the standard more favorable to the plaintiff, and the lower courts determined that the Army had met that exacting standard in this case.

absence of discrimination (Pet. App. 16a).[5] The district court here, unlike the court in *Pecker*, was therefore unable to adopt an administrative causation analysis that was favorable to petitioner, because the EEOC's causation inquiry resulted in a finding that was adverse to petitioner. Accordingly, the court, "in accordance with [petitioner's] wishes" (Pet. App. 15a), limited its de novo factual review to a determination of whether petitioner would have been promoted in the absence of discrimination. Thus, as the Sixth Circuit observed (*id.* at 16a), the distinction between *Pecker* and the instant case is "obvious" and the decisions of the Sixth Circuit in this case and the Fourth Circuit in *Pecker* are entirely consistent.

3. Petitioner contends (Pet. 32-35) that this case raises "questions of exceptional importance concerning the role of causation" in Title VII cases. No important issue is presented by the petition. The timing of the causation inquiry is, as described above, not relevant to the proper disposition of the petition and, as petitioner acknowledges (Pet. 33-35), no circuit currently holds the view that a causation inquiry is inapplicable to a Title VII employment discrimination claim. Finally, petitioner's suggestion (Pet. 35-36) that review is warranted because the courts of appeals have largely "failed to recognize the critical distinction between individual and class action employment discrimination cases this Court identified in *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867 (1985)," is unavailing. No one disputes that the focus of the causation inquiry might differ in the two contexts, and petitioner nowhere suggests how the absence of any explicit recognition of this "critical" distinction led the court of appeals to an erroneous result in this case.

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[5] For the reasons previously described, the EEOC's pre-*Blalock* determination of the Army's Title VII liability did not include a finding favorable to petitioner on the causation issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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